

At the other extreme would be one or more nationwide licenses. Such large license areas would have the drawback, as the Commission observes, of limiting the number of firms that may provide PCS. On the other hand, such licenses would help ensure a nationally compatible PCS system.^{32/}

The Commission's options include those based on Rand McNally's 487 Basic Trading Areas or 47 Major Trading Areas.^{33/} Rand McNally apparently determined the boundaries of these trading areas after studying such factors as physiography, population distribution, newspaper circulation, economic activities, highway facilities, railroad service, suburban transportation, and field reports of sales analysts.^{34/}

^{32/} The compatibility afforded by such a license could be important for purposes of emergency preparedness and national defense, to the extent that PCS is used for such purposes. See NCS Comments. Although such compatibility could develop in response to market forces, the Commission should monitor its development.

^{33/} See Notice, 7 FCC Rcd at 5700, para. 60.

^{34/} See Rand McNally, supra note 18, at 39. According to Rand McNally, a Basic Trading Area is an area surrounding at least one Basic Trading Center, which is a city that serves as a center for shopping good purchases for the surrounding area and provides its surroundings with various specialized services, such as medical care, entertainment, higher education, and a daily newspaper. (Shopping goods are those retail items a shopper ordinarily travels some distance to purchase and for which he or she compares qualities, styles or prices before buying. Most sales of shopping goods are made through general merchandize or apparel stores.) Id. at 36. Some Basic Trading Areas have two or more Basic Trading Centers, because residents may conveniently shop at either one. All Basic Trading Area boundaries follow county lines and are drawn to include the county or counties whose resi-
(continued...)

The Commission has little basis, however, for concluding that either the Major Trading Areas or Basic Trading Areas are ideal as areas for PCS licenses. While their size and correlation to commercial patterns make them attractive alternatives, they do not necessarily reflect the needs of future PCS users. Moreover, the Basic Trading Areas are almost as numerous as MSAs and RSAs, while the Major Trading Areas may be considered too large because they often incorporate more than one metropolitan area.

NTIA suggests that the Commission consider yet another option, that of using the 183 "economic areas" defined by the Department of Commerce's Bureau of Economic Analysis (BEA).^{35/} Each of these economic areas generally consists of an MSA^{36/} or a similar area that serves as a center of economic activity and

^{34/} (...continued from preceeding page)
dents make most of their purchases in the area's Basic Trading Center or suburbs. Populations within these areas range from approximately 30,000 to 18 million. Id. at 40-43.

A Major Trading Area consists of two or more adjacent Basic Trading Areas. A Major Trading Center is a city within a Major Trading Area that serves as a primary center of wholesaling, distribution, banking, and specialized services such as advertising. A Major Trading Area is named after the one or more cities within their boundaries that are its Major Trading Centers. Populations within these Major Trading Areas range from 1.1 to 26 million people. Id. at 40.

^{35/} Bureau of Economic Analysis, U.S. Dep't of Commerce, BEA Regional Projections to 2040, Vol. 3: BEA Economic Areas app. A (1990) ["BEA Regional Projections to 2040"].

^{36/} The MSA containing the largest percentage of employment in an area is generally selected to be an area's principal center.

surrounding counties that are economically related to the center. Commuting patterns are a major factor used in determining the economic relationships among counties; to the extent possible, each economic area includes both the place of work and residence of its local labor force.^{37/}

The BEA economic areas are, in number, similar to the total number of LATAs (183 BEA areas versus 194 LATAs), and, like the Rand McNally Basic Trading Areas and Major Trading Areas, are based on economic and commuting data. Thus, the BEA areas could provide yet another alternative to the Commission.

Moreover, if the Commission chooses to authorize a large number of providers per geographic service area, as NTIA

37/ BEA Regional Projections to 2040, supra note 35. To define these economic areas, BEA chose the MSA containing the largest percentage of employment in an area. In cases where smaller MSAs were in the same area, they were added as secondary centers. For those parts of the United States without MSAs, major cities were chosen as principal centers.

After BEA chose the principal centers, it examined each of the approximately 2,600 counties that were not within a center to determine the center to which it was most closely related. In many instances, the association between a county and particular center is based not on direct commuting ties to the central city or county but on commuting ties to a noncentral county that itself is tied to the center. For rural areas, BEA decided that commuting data alone could not be relied upon to assign counties to principal centers and, as a result, used supplemental data such as metropolitan newspaper circulation and the advice of state planning officials who were familiar with the geographic and economic characteristics of the areas.

recommends above,^{38/} the Commission may wish to vary the geographic size of at least one or more of those licenses. This option may provide the greatest range of choices for consumers.

More importantly, however, the issue of geographic size of PCS licenses is another example of the Commission having to make an administrative decision regarding an economic issue that is best solved through the interplay of market forces. Therefore, regardless of the geographic licensing scheme adopted by the Commission, NTIA believes that the Commission should establish rules for PCS licensees that allow market forces to alter those geographic areas over time, thus helping to determine optimal license areas in the long term. It is crucial that market forces be allowed to determine the method by which the aggregate social value of spectrum is maximized. NTIA thus recommends that the Commission allow licensees to aggregate and subdivide their licenses freely in response to market forces.^{39/}

^{38/} See discussion supra section II.A.

^{39/} As mentioned supra note 32, the Commission should initially rely on market forces to eliminate the technical incompatibilities that could exist between users and PCS service provider equipment in adjacent service areas, while carefully monitoring progress in this area. PCS service providers in adjacent areas could have financial incentives to eliminate the technical incompatibilities in instances where the demand for PCS across adjacent areas is large relative to demand within a PCS service area. For a discussion of the incentives different private networks have to adopt compatible specifications so that cross-network transactions occur, see Center for Economic Policy Research, Stanford Univ., CEPR Pub. No. 196, Compatibility and the Creation of Shared Networks (Apr. 1990).

D. The Commission Should Seek Authority to Use Competitive Bidding to Assign PCS Licenses.

In the Notice, the Commission asks for comment on the licensing methods it should employ for selecting among mutually exclusive PCS applications.^{40/} The Commission concludes correctly that comparative hearings would not be an appropriate licensing mechanism for PCS because they are likely to be time consuming and expensive for applicants and the Commission. It therefore seeks comment on whether lotteries or competitive bidding would be the most appropriate licensing mechanism.

NTIA strongly endorses the use of competitive bidding rather than lotteries or comparative hearings to assign PCS licenses. No proposal to "fix" the lottery mechanism can address the fundamental inefficiencies and distributional problems of lotteries, which allow private parties to obtain a windfall from the award of a Commission license by selling those licenses in the secondary market.

The lottery process has led to instances in which parties obtaining Commission licenses have quickly sold those licenses for millions of dollars in "private auctions."^{41/} These transactions represent windfalls to lottery winners that should

40/ See Notice, 7 FCC Rcd at 5707, para. 82.

41/ See, e.g. National Telecommunications and Information Administration, U.S. Dep't of Commerce, Spec. Pub. No. 91-23, U.S. Spectrum Management Policy: Agenda for the Future 92 (Feb. 1991).

be realized by the U.S. government on behalf of taxpayers at the time the licenses are awarded.

The answer is not simply to limit eligibility for a lottery giveaway, or to restrict transfers after the lottery. Limiting participation in a lottery may shut out many individuals or small businesses that have a valid right to seek a license. Moreover, the more administrative limits placed on entry, the more the lottery process will begin to resemble comparative hearings, with concomitant delays. Limiting post-licensing transfers of licenses would inhibit the ability of firms desiring to provide service from obtaining licenses, and thus would be economically inefficient. Such restrictions would be a step back from flexibility and greater reliance on market forces for PCS.

Moreover, competitive bidding is the only licensing mechanism that itself increases efficiency in spectrum use. Competitive bidding could be used to provide answers to many of the difficult market structure questions the Commission is attempting to answer in this proceeding, such as the number of licenses in a market and the amount of spectrum assigned to each licensee, as it attempts to establish a potentially enormous new industry. For these reasons, NTIA urges the Commission to recommend strongly to Congress that it be granted the authority to use competitive bidding to license PCS providers.

Many questions remain, however, regarding the implementation such bidding. The Commission only begins to seek answers to these questions in the Notice. NTIA applauds these efforts and encourages the Commission both to seek authority for competitive bidding, and to study further specific competitive bidding techniques.

III. NTIA SUPPORTS LICENSING ELIGIBILITY AND SERVICE FLEXIBILITY POLICIES THAT PROMOTE THE DEVELOPMENT OF COMPETITIVE MARKETS.

- A. The Commission Should Initially Allow Cellular Providers to Obtain PCS Licenses Only Outside of Their Service Areas, but Should Review This Approach Three Years After PCS Licenses Are Assigned.

The Commission seeks comment on its proposal to allow cellular providers to acquire PCS licenses outside their service areas,^{42/} and also requests comment on whether cellular providers should be allowed to obtain PCS licenses within their service areas.^{43/}

As a general principle, NTIA believes that societal welfare would be enhanced if all potential applicants have the opportunity to acquire PCS licenses, provided that their activities do not raise anticompetitive concerns. Permitting cellular providers to acquire PCS licenses could result in

^{42/} Notice, 7 FCC Rcd at 5703, para. 67.

^{43/} Id. Further, the Commission asks whether the amount of PCS spectrum held by cellular licensees should be limited, if they are allowed to hold PCS licenses.

greater productive efficiency, to the extent that they realize economies of scope in providing both cellular services and PCS. However, if cellular providers were to act anticompetitively, such as by acquiring PCS licenses to prevent competition in cellular markets, then society's interests would not be promoted.

NTIA believes that the Commission's proposal to allow cellular providers to acquire PCS licenses outside their service areas is sound. Because cellular providers will have no special advantage over their PCS competitors in offering PCS and related services outside of their current service areas, NTIA supports the Commission's proposal to allow cellular providers to acquire such licenses.^{44/}

The issue of allowing cellular operators to obtain PCS licenses in their cellular service areas is more difficult. The extent to which anticompetitive concerns exist depends, in part, on several Commission decisions to be made in this proceeding. As our earlier discussion indicates, NTIA supports a broad service definition for PCS -- one that acknowledges the potential development of "cellular-like" PCS offerings. Indeed, because many industry participants apparently view PCS as a substitute for cellular services, we are particularly interested in permitting new PCS licensees to enter markets now served by the

^{44/} Such licensing eligibility for providing PCS should apply to both the 2 GHz and 900 MHz PCS bands proposed in the Notice.

cellular duopoly. This goal would not be advanced by permitting cellular providers, which already hold 25 MHz of spectrum in their license areas, to obtain still more spectrum in those areas, which could otherwise be assigned to new entrants. Thus, we recommend that the Commission promote competition among PCS and cellular providers by initially prohibiting the acquisition of PCS licenses by cellular providers in their own service areas, allowing PCS licensees to enter cellular markets, and at the same time permitting cellular providers to offer PCS using their existing frequencies.^{45/}

While the Commission initially should not allow cellular providers to acquire PCS licenses in their existing service areas, NTIA believes that the Commission should review this limitation, in light of subsequent market developments, three years after initially assigning PCS licenses. This review should examine how the PCS and cellular markets have developed, the

^{45/} If the geographic license areas for PCS do not match those of the cellular service, the Commission must determine how cellular providers may obtain PCS licenses in areas that overlap their cellular license areas. One approach to resolve this issue would be for the Commission to permit a cellular licensee to hold a PCS license in its cellular license area if the number of potential subscribers in that area is a relatively small percentage of all potential subscribers in the PCS license area. Alternatively, the Commission could simply specify that PCS licensees are not authorized to offer service in any geographic area in which they hold a cellular license. Thus, for example, if a cellular provider obtained a PCS license, it might be required to transfer its interest in that license within its cellular service area. The Commission should evaluate the record carefully to determine which of these approaches best promotes an actively competitive market for consumers.

degree to which cellular services and PCS offerings are close substitutes, the extent to which cellular providers are offering PCS-type services and vice versa, and the extent to which spectrum-related acquisitions have occurred among PCS license holders.

Indeed, because under NTIA's proposals, PCS providers would have flexibility to obtain or transfer spectrum and to consolidate their operations, after three years, the case for prohibiting cellular providers from obtaining PCS licenses in their service areas may be weakened substantially. After three years of experience, the Commission will be able to examine the state of competition in both cellular and PCS markets and better judge whether cellular operators should be permitted to acquire PCS spectrum in areas in which they are currently providing cellular service.^{46/}

B. The Commission Should Foster Competition Among Cellular and PCS Licensees in Providing a Wide Variety of Telecommunications Services.

The Commission proposes to revise Section 22.930 of its rules^{47/} to state explicitly that cellular licensees may provide

^{46/} This is the same three-year period that NTIA suggests for limiting consolidation that would reduce the number of PCS licenses to fewer than three. See supra p. 8.

^{47/} 47 C.F.R. § 22.930 (1991).

PCS-type services such as wireless PBX, data transmission, and telepoint services.^{48/}

NTIA believes the Commission should permit cellular providers more flexibility in offering services to compete with PCS providers. Thus, cellular providers should be free to develop PCS offerings within their existing frequencies. To the extent that PCS licensees offer services that compete with traditional cellular offerings, cellular carriers should be free to respond effectively to that competition. Similarly, cellular providers should be able to use their spectrum for new PCS-type services. We support the Commission's proposal to allow cellular licensees to make better use of their existing frequencies, and to evolve their services to meet the changing needs of their customers.^{49/}

- C. The Commission Should Allow LECs, Except Where Barred by Their Cellular Holdings, to Hold PCS Licenses, Subject to Nonstructural Safeguards.

The Commission tentatively concludes that there is a strong case for allowing LECs to provide PCS within their respective

^{48/} Notice, 7 FCC Rcd at 5704, para. 70. The Commission also proposes to remove its requirement that cellular operators must notify it of their intent to offer new services at least thirty days prior to the implementation of those services, in order to allow cellular carriers to respond more effectively to competition from PCS providers. See 47 C.F.R. § 22.930 (1991).

^{49/} Thus, we support the Commission's proposal to remove its "prior notification" requirement on cellular carriers.

service areas.^{50/} In doing so, it asks for comment on several related issues. The Commission suggests that each LEC, before commencing PCS, be required to file and implement an adequate plan comprised of nonstructural safeguards that address discrimination and cross-subsidization concerns.^{51/} In addition, the Commission tentatively concludes that a 10 MHz assignment may be sufficient for the initial deployment of a PCS system integrated with a wireline LEC, but asks for comment on whether a greater or lesser amount of spectrum is appropriate.^{52/}

Most LECs provide cellular and traditional wireline services in their service areas. These LECs, like other cellular providers, initially should be eligible to obtain PCS licenses only outside their cellular service areas. The Notice acknowledges the possibility that LECs may want to employ PCS for services complementary to their traditional local exchange offerings, including the use of wireless loop plant in instances where it proves to be more economical than wired alternatives.^{53/}

^{50/} Notice, 7 FCC Rcd at 5705-06, para. 75.

^{51/} Id. at 5706, para. 76, n.51; para. 78, n.54.

^{52/} Id. at 5706, para. 77. The Commission suggests three ways that a 10 MHz block could be provided: allowing LECs to acquire a portion of the proposed PCS allocation, allowing LECs along with other applicants to apply for an additional 10 MHz supplement to the PCS allocation (possibly 1895-1900 MHz and 1975-1980 MHz) drawn from the proposed emerging technologies band, and allowing LECs to lease or purchase up to 10 MHz after licensing is completed. Id. at 5706, para. 78.

^{53/} Id. at 5705, para. 73.

The Commission should allow LECs such access to PCS in several ways. As our prior discussion suggests, if the Commission liberalizes the current cellular service rules,^{54/} LECs with cellular licenses could potentially develop PCS offerings needed within their existing cellular service areas, including wireless loop services.

Under the Commission's proposal, a LEC without cellular holdings would, subject to safeguards, be allowed to obtain a PCS license or licenses in its wireline service areas, also permitting it to develop PCS offerings within its existing service areas. Alternatively, LECs, regardless of whether they have cellular operations, could purchase services from various PCS providers where it is more advantageous to do so. Thus, the Commission's proposal to allow LECs to hold PCS licenses, except where barred by their cellular holdings, will give all LECs the ability to shape and use PCS technology to serve the interests of telephone customers.

We agree with the Commission's proposal that LECs eligible to hold PCS licenses should, prior to the commencement of service, file and implement acceptable plans comprised of nonstructural safeguards sufficient to protect against the possibility of discrimination and cross-subsidization. To develop a competitive PCS market, such safeguards can help to

^{54/} See discussion supra section III.B.

ensure that a LEC does not improperly favor its own PCS operations at the expense of other PCS competitors. NTIA believes that the Commission should move expeditiously to provide guidance to LECs in developing nonstructural safeguard plans for PCS. Such guidance should address nondiscriminatory interconnection and installation practices, network disclosure, customer information, and cross-subsidy issues.^{55/}

Other than as discussed above, NTIA believes that LECs eligible for PCS licenses should be allowed to apply for PCS spectrum under the same conditions as suggested for other PCS applicants. We agree with the Commission that none of the radio spectrum allocated to PCS should be "set aside" for LECs. More generally, we believe that no radio spectrum should be set-aside for any particular category of potential PCS applicants. The absence of spectrum set-asides, and the implementation of effective nonstructural safeguard plans by eligible LECs, will promote the growth of competitive PCS markets.

^{55/} As one means of affording greater flexibility to LEC providers of PCS in their cellular frequencies, the Commission should consider replacing structural separation requirements for Bell company cellular operations with nonstructural safeguards. See Notice, 7 FCC Rcd at 5706, para. 76.

IV. NTIA SUPPORTS REGULATORY CLASSIFICATIONS FOR PCS THAT ENCOURAGE THE DEVELOPMENT OF AN OPEN, COMPETITIVE MARKETPLACE.

A. Regardless of Their Regulatory Classification as Common or Private Carriers, PCS Providers Should Be Subject to Minimal Regulation.

In addition to the licensing, spectrum management, and eligibility issues discussed above, the Commission seeks comment on the regulatory classification of PCS providers. The Commission seeks comment on three possibilities: that PCS providers should be (1) classified as private carriers, falling within the statutory definition of the private land mobile radio service contained in Sections 3(gg) and 332(c) of the Communications Act of 1934 (the Act),^{56/} (2) regulated as common carriers under Title II of the Act, or (3) eligible to provide service on either a common carrier or private carrier basis.^{57/}

NTIA agrees with the Commission that because PCS should be structured as a highly competitive service, it should be subjected to minimal regulation, regardless of its regulatory classification. However, until it becomes clearer what sorts of services will be offered under the PCS rubric, it may be difficult for the Commission to decide upon the appropriate

^{56/} 47 U.S.C. §§ 153(gg), 332(c) (1988).

^{57/} Notice, 7 FCC Rcd at 5712-14, paras. 95-98. Although much of the following analysis focuses on land mobile services, as the Commission requested, we recognize that similar classification issues could arise for mobile satellite services which, in the future, could also be an integral part of the PCS environment.

regulatory classification. Classification of PCS as private carriage has certain advantages on policy grounds. As a practical matter, we expect that some PCS offerings could appropriately be classified as private carriage, while other services would constitute common carriage. The Commission's goal in this proceeding should be to adopt a flexible regulatory framework that encourages the development of wide variety of PCS-type services, while maintaining similar regulatory treatment for providers that effectively compete in the same marketplace.

There does not appear to be a single answer to the question of the most appropriate regulatory treatment for PCS, as it is possible that PCS providers will offer a wide variety of services with differing characteristics. As a matter of law, there is a question whether all varieties of PCS could appropriately be classified as private land mobile services. Section 3(gg) of the Act, adopted as part of the Communications Amendments Act of 1982 (Communications Amendments Act), defines private land mobile service as a "mobile service" that provides "private" land mobile communications by "eligible users" within a "designated area." Section 332(c)(1), in turn, provides that private land mobile service includes SMR and other dispatch-type systems even though "such service is provided indiscriminately to eligible users on a commercial basis."^{58/} This effectively nullifies the traditional

^{58/} Section 332(c)(1), 47 U.S.C. § 332(c)(1) (1988), provides in full:

(continued...)

common law test for distinguishing between common carriage and private carriage enunciated in National Association of Regulatory Utility Commissioners v. FCC,^{59/} which was used to interpret the definition of common carrier found in Section 3(h) of the Act.^{60/} Section 332(c)(1) provides further that land mobile stations that are "shared by authorized users" are barred from interconnecting with the public switched telephone network unless those users obtain such interconnection directly from an authorized common carrier.^{61/}

58/ (...continued from preceeding page)

[P]rivate land mobile service shall include service provided by specialized mobile radio, multiple licensed radio dispatch systems, and all other radio dispatch systems, regardless of whether such service is provided indiscriminately to eligible users on a commercial basis, except that a land station licensed in such service to multiple licensees or otherwise shared by authorized users (other than a nonprofit, cooperative station) shall not be interconnected with a telephone exchange or interexchange service or facility for any purpose, except to the extent that (A) each user obtains such interconnection directly from a duly authorized carrier; or (B) licensees jointly obtain such interconnection directly from a duly authorized carrier.

59/ 525 F.2d 630 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976).

60/ 47 U.S.C. § 153(h) (1988).

61/ Relying on this statutory language, the Commission has applied the ban on interconnection in a narrow fashion in one line of cases, concluding that it applies only to those private land mobile systems that are licensed to multiple users or shared by authorized users. Paul Kelley d/b/a American Teltronix, 3 FCC Rcd 1091, 1092 (1988), aff'd, 5 FCC Rcd 1955, 1956 (1990). In the Commission's view, which has been upheld on appeal, a land mobile licensee is "shared" only if the end users have the ability to access
(continued...)

The legislative history to the Communications Amendments Act makes clear that in enacting Section 332, Congress intended to draw a functional distinction between private and common carrier land mobile radio service. The Conference Committee report to the Communications Amendments Act states:

The basic distinction set out in this legislation is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier. If not, it clarifies that private systems may be interconnected with the public switched telephone network [so long as certain conditions are met]. . . [and shall still be deemed] private land mobile service.^{62/}

The Conference Report explains further that "subsection 331(c)(1) . . . prohibits such shared systems from being interconnected with common carrier facilities if the licensees or entrepreneurs are engaging in the resale of telephone service or facilities"^{63/} and that "only if a private land mobile operator or licensee is

61/ (...continued from preceeding page)
and control the system transmitter. See Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir. 1985); Paul Kelley d/b/a American Teltronix, 5 FCC Rcd 1955, 1956 n.24 (1990) (under Section 90.179 of the Commission's rules, a station is shared when users can directly activate the station transmitter). In another line of cases, the Commission has stated broadly that the test for inclusion in the private land mobile radio service is whether a licensee resells interconnected telephone service, without acknowledging that the statute on its face applies this limitation only to shared systems. See, e.g., Fleet Call, Inc., 6 FCC Rcd 1533, recon. dismissed, 6 FCC Rcd 6989 (1991).

62/ H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 55 (1982), reprinted in 1982 U.S.C.C.A.N. 2237, 2299 ["Conference Report"].

63/ Id.

reselling for profit interconnected common carrier services is the interconnection prohibited."^{64/}

Whether PCS can properly be classified as a private land mobile service under this statutory test is subject to debate. A reasonable argument exists that PCS providers should not be regulated as common carriers, for the Commission has broad discretion to classify entities as private carriers under Section 332(c)(1), subject only to the ban on resale of interconnected telephone service for profit.^{65/} Arguably, PCS licensees would not even fall within the scope of that ban because such systems would not be "shared" by authorized users, as the Commission has interpreted that term.^{66/} Furthermore, even if the Commission were to apply the ban on the resale of interconnected telephone service more broadly, it could be argued that PCS firms would be providing land mobile service; any interconnection with the public switched telephone network would be incidental and separate,^{67/} and in any event provided on a nonprofit cost sharing basis in a fashion similar to Section 90.477 of the

^{64/} Id. at 56, 1982 U.S.C.C.A.N. at 2300.

^{65/} See, e.g., Paul Kelley d/b/a American Teltronix, 5 FCC Rcd at 1956.

^{66/} See supra note 61.

^{67/} Indeed, some potential PCS-type services may not be interconnected with the public switched telephone network at all, such as the provision of a wireless LAN within an office building or portable personal computers that receive and transmit data.

Commission's rules,^{68/} thereby meeting the requirements of Section 332(c)(1).

On the other hand, a plausible counter-argument can be made that because the essence of most PCS-type services will be the provision of telephone message service, albeit in many instances in a mobile environment, PCS providers "functionally" will be providing telephone service as "part of" their service offerings and, as such, they should be regulated as common carriers.^{69/} Moreover, it is questionable whether some potential PCS applications, such as wireless LANs and wireless PBXs, would meet the statutory requirement that such service be "mobile." While one end of the communications path would potentially be movable, it would normally remain fixed during the course of day-to-day operations. Furthermore, to the extent that satellite-based PCS becomes a reality, it would not appear that such services would fit within the statutory definition of the private land mobile service.

^{68/} 47 C.F.R. § 90.477 (1991).

^{69/} Some would argue that in defining the private land mobile service in Section 332, Congress intended only to encompass dispatch-type services. This may represent a cramped reading of the statute, however, as the use of the phrase "private land mobile service shall include" SMRs and all other radio dispatch systems suggests that Congress intended an expansive service definition for private land mobile.

Classifying PCS as private carriage would have desirable policy consequences. As the Commission recognizes,^{70/} state entry and rate regulation would be preempted, which could encourage the development of PCS under uniform national standards. PCS providers would not be subject to the obligations of Title II of the Act, enabling them to respond more rapidly to market needs, thereby benefiting consumers. Because we expect there to be robust competition between new PCS licensees, NTIA does not anticipate that Title II obligations are necessary to protect PCS consumers, for the market will provide incentives to maintain reasonable pricing and service quality.^{71/}

At the same time, the Commission should consider carefully whether classifying PCS as private carriage would maintain an appropriate level of regulatory parity between wireless competitors. To the extent that PCS providers provide services similar to, or possibly even indistinguishable from, conventional cellular telephone service, it is difficult to justify regulating one group of firms as private carriers and the other as common carriers, particularly if the burdens placed on them are

^{70/} Notice, 7 FCC Rcd at 5713, para. 96.

^{71/} Moreover, even if PCS providers are relieved of Title II constraints, they still would be subject to antitrust laws prohibiting predatory pricing and other anticompetitive conduct.

different.^{72/} In making its decision, the Commission should strive to maintain regulatory freedom both for PCS providers and their principal competitors.^{73/}

The Commission also solicits comment on whether PCS providers could be eligible to offer service on either a private or common carrier basis. As a legal matter, it is well established that a single entity may engage in both common carriage and private carriage.^{74/} However, such a proposal could raise difficult implementation issues if a carrier intended to

^{72/} Cellular telephone providers do not file tariffs at the federal level (other than interexchange access tariffs in the case of wireline carriers subject to the AT&T Consent Decree) because their services are presumed to be intrastate and thus subject only to state jurisdiction. However, as common carriers, cellular providers are barred from providing dispatch services, dedicating channels for service to particular customers, and providing fixed services except on an ancillary basis. If PCS providers are treated as private carriers, it may be reasonable for the Commission to consider relaxing some of the requirements imposed on cellular carriers so that they have more flexibility to respond to competition in this area.

^{73/} The Commission proposes that if PCS providers are classified as common carriers, they should be treated as non-dominant carriers under Competitive Carrier and thus not subject to tariff regulation at the federal level. Notice, 7 FCC Rcd at 5713, para. 97. Such regulatory treatment would put PCS providers on a similar footing to paging and other public land mobile radio carriers. See Preemption of State Entry Regulation in the Public Land Mobile Service, 59 Rad. Reg. 2d (P&F) 1518 (1986), vacated and remanded on other grounds sub nom., National Ass'n of Regulatory Utility Commissioners v. FCC, No. 86-1205 (D.C. Cir. Mar. 30, 1987), clarified, 2 FCC Rcd 6434 (1987) (public land mobile service licensees treated as non-dominant carriers under Competitive Carrier).

^{74/} See, e.g., Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

use a single set of frequencies to offer both private and common carrier services. Moreover, allowing a single network to be used for both private and common carrier offerings potentially raises difficult cost allocation issues.

Given the various potential applications for PCS, it may not be possible to classify all of the services within the PCS family solely as private carriage or common carriage. The Commission may have to address each type of service individually. Whatever regulatory classification the Commission chooses, however, it should minimize unnecessary regulatory burdens on PCS providers. Only then will such firms have the freedom to evolve their service offerings in response to market forces.

- B. If PCS Is Classified as Common Carriage, the Commission Generally Should Not Preempt State Regulation of PCS at This Time.

In the Notice, the Commission solicits comment on whether, and to what degree, it should preempt state and local regulation of PCS, if it classifies PCS as a common carrier service.^{75/} NTIA believes that, as a general matter, Commission preemption of state regulation of PCS may be necessary, but would be premature at this juncture. At the same time, we urge the Commission to

^{75/} Specifically, the Commission seeks comment on whether the intrastate components of PCS could be severed technically or otherwise from the interstate components for regulatory purposes, and, if not, whether state or local regulation of the intrastate components would thwart or impede the federal policies underlying the interstate provision of PCS. Notice, 7 FCC Rcd at 5713, para. 97.

examine carefully the record developed in this proceeding and to monitor state regulation of PCS as it develops, so that it can determine whether preemption of specific state policies regarding PCS is necessary at some future date.

Under Louisiana Public Service Commission v. FCC,^{76/} the Commission has authority to preempt state regulation when it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," and the state regulation would negate the federal rule.^{77/} Here, when both the technology for PCS is still under development, and the states' regulatory responses are in their early stages, it would be difficult for the Commission to craft a narrowly tailored preemption order.^{78/}

^{76/} 476 U.S. 355 (1986).

^{77/} Id. at 375 n.4 (emphasis in original). In construing the "inseparability" doctrine recognized by the Supreme Court in Louisiana, the federal courts of appeals have held that the Commission must show that state regulation over intrastate service thwarts or impedes the Commission's exercise of its lawful authority over interstate communications service. See National Ass'n of Regulatory Utility Commissioners v. FCC, 880 F.2d 422, 430 (D.C. Cir. 1989); Illinois Bell Telephone Co. v. FCC, 883 F.2d 104, 115 (D.C. Cir. 1989); Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325, 1332-1333 (D.C. Cir. 1989); California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990).

^{78/} Louisiana has been held to limit the ability of the Commission to preempt state regulation of intrastate radio common carriage. See California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986).

Rather than preempting immediately, the Commission should analyze carefully details regarding the technical and economic feasibility of developing and implementing separate regulatory structures for interstate and intrastate PCS. The Commission should examine the record developed in this proceeding to determine what regulatory requirements, if any, the states intend to impose on PCS providers, and how those requirements might affect the federal objective of ensuring an open, competitive market for PCS. Once state policies regarding PCS are developed and implemented, the Commission will be in a better position to determine whether federal and state rules can coexist.

- C. The Commission Should Preempt the States with Respect to the Terms and Conditions of PCS Interconnection, but Refrain from Preempting State Regulation of Rates for Interconnection.

In the Notice, the Commission proposes to "confirm explicitly" that PCS providers have a federally protected right to interconnect with the public switched telephone network.^{79/} The Commission declines to mandate particular types of interconnection arrangements, but proposes that such interconnection be on reasonable terms that are no less favorable than those offered by the LEC to other customers or carriers.^{80/}

^{79/} Notice, 7 FCC Rcd at 5714, para. 99.

^{80/} Id. at 5715, paras. 100-101. The Commission also seeks comment on the extent to which its decisions concerning federal authority over cellular interconnection should apply to PCS. Id. at 5715, para. 103. As different PCS providers may provide a variety of services functionally different
(continued...)